Supreme Court, U.S.
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NO. 86-410

in the Supreme Court of the United States

October Term, 1985

RANDALL FRINT and YHONIS FRINT,

Petitioners,

-against-

TEXACO, INC.,

Respondent.

TEXACO, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Eleventh Circuit Court of Appeals Erred in Affirming the Decision Below Per Curiam where the Court had Multiple Grounds upon which to Affirm Including Failure to Preserve Error on Appeal and where No Conflict Exists between the Eleventh Circuit's PCA and the Decisions Cited by the Frints.

II.

Whether the Trial Court Erred in Denying The Frints' Motion for a New Trial Where the Evidence Clearly Showed No Liability on the Part of Defendant Texaco, Inc. and Therefore any Mention of Social Security Disability Insurance Benefits was Harmless Error.

III.

Whether the Trial Court Erred in Denying the Frints' Motion for a New Trial Where The Frints Opened the Door to Evidence of Social Security Disability Benefits Through Their Own Expert's Testimony.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case omits several pertinent facts. Plaintiff, Randall Frint, was an employee of a Texaco, Inc. sub-lessee, ABC Service Station.[1] His duties included pumping gas for customers at the full service pumps and cleaning the grounds around the gas pumps. The accident complained of occurred at approximately 7:30 a.m. near the beginning of Mr. Frint's shift.

All fact witnesses, including Randall Frint, testified that it had been raining hard all night before the accident. Several witnesses testified that it was still raining shortly before the accident occurred. The only evidence of a water line mist was from Randall Frint himself, and he testified that while it had been leaking for several months, he told no one. Thus, the evidence was uncontroverted that neither the ABC Service Station nor Texaco, Inc. had knowledge of a water line leak.

The Frints alleged that ABC was Texaco's agent, but the evidence supported Texaco's position that under the terms of the sublease contracted between Texaco and ABC Service Station, Texaco, Inc. had no responsiblity to repair unless it was notified that repair was required and was requested to effectuate the repair. Texaco established a "hotline" for that purpose in Houston, Texas. Texaco received no call about the allegedly ruptured water line.

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[1]In compliance with Supreme Court Rule 28.1, Texaco, Inc. sets forth in an Appendix attached to this Brief, its affiliates and subsidiaries listed on its most recent Form 10K filed with the Securities and Exchange Commission.

The testimony was not in "irreconcilable conflict" as the Frints note in their Statement of the Case, p.9. The jury returned a no liability verdict within 40 minutes of retiring. The verdict form reflects that the jury never reached damages. To the first question: "Was there negligence on the part of Texaco, Inc. which was a legal cause of damage to Randall Frint, and Yhonis Frint", the jury answered "No." Then, following the verdict form's and the court's instruction, the jury properly proceeded no further and returned to the courtroom.

The Frints' economist expert, Mr. Schulenberger, testified that Randall Frint's future earning capacity included social security retirement benefits. Texaco's expert, Mr. Tomson, responded in kind, telling the jury if Randall Frint was disabled, he would be eligible for social security disability benefits. Frints' rebuttal witness, June Burke, testified that Mr. Frint should "retire with dignity" and that he would be eligible for social security, medicare and medical benefits. In closing argument, Texaco's counsel commented on the abovementioned evidence.

The Frints' counsel elicited Mr. Schulenberger's testimony regarding social security retirement benefits. Moreover, counsel did not object to June Burke's testimony or to defense counsel's closing remarks. His only objection occurred during Mr. Tomson's testimony early in the trial. However, that objection came *after* Mr. Tomson testified, and the plaintiffs' counsel failed to move to strike the evidence. Further, counsel's objections to Mr. Tomson's testimony on social security benefits was not specifically based on the collateral source doctrine, but on mischaracterization of the

amount of wages, on irrelevancy, on the fact that the evidence did not go to the issues in the case, and on the fact that the evidence went to loss of future earnings capacity.

SUMMARY OF ARGUMENT

The Frints fail to demonstrate any apparent or direct conflict between the Eleventh Circuit per curiam affirmance below and the three United States Supreme Court decisions they cite. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 268 (1963), *Eichel v. New York Central Railroad Co.*, 75 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963) and *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) are legally and factually distinguishable from the case at bar.

The Frints' contention that the Eleventh Circuit misinterpreted Florida law is incorrect and even if true, would not suffice as a basis for certiorari. This Petition arises out of a simple negligence action with unique facts. This case is not of importance to other litigants. Certiorari review would not establish important precedent. The Eleventh Circuit reached a reasonable and permissible result.

REASONS FOR DENYING THE WRIT

This case is not appropriate for review. The Frints allege conflict but fail to demonstrate either the presence of any of the special or important reasons enumerated in Supreme Court Rule 17.1 or that the case below is within the character of Rule 17.

Petitioners assert conflict between this Eleventh Circuit Court of Appeals per curiam affirmance and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 268 (1963), and two other United States Supreme Court cases. Supreme Court Rule 17.1(c) provides that the conflict between a federal court of appeal and the Supreme Court be over a federal question. However, the case at bar devolves from a diversity action. The issues involve Florida substantive law and federal procedural law. No federal question was pled or tried.

The Frints observe that the lower appellate court did not write an opinion, but contend that the conflict "clearly appears when all potential alternative basis for decision are logically eliminated." (Petition for Writ of Certiorari, p.11). This conflict standard is offered without authority and, even if this "standard" were legally correct, the Petition fails to eliminate alternative bases. Indeed, the Frints defeat their own argument by reciting several possible reasons for the affirmance. Although the absence of an opinion does not foreclose certiorari in all situations, the lack of opinion herein takes on additional significance, because the Eleventh Circuit could have affirmed on several grounds.

The Frints' attempt to create a conflict where none is apparent flies in the face of this Court's traditional view that there must be a real or intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized. They make the conclusory statement that the PCA below conflicts with Supreme Court decisions, but fail to explain the conflict.

The cited Supreme Court cases do not conflict with the Eleventh Circuit's affirmance. They were not even controlling precedent in this diversity action. The cited opinions did not address the issues in the case at bar, i.e., Florida substantive law on collateral estoppel, federal procedural law on "opening the door" to evidence, or federal procedural law on failing to preserve error for appeal by proper and timely objection.

The *Tipton* decision involved federal law, not Florida law and addressed the issue whether evidence of compensation received under the Longshoremen's and Harbor Worker's Compensation Act affected the liability issue of the Plaintiff's status. *Eichel v. New York Central Railroad Co.*, 75 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963) did not involve Florida substantive law. A general verdict was at issue in *Eichel*, not a special verdict where the court could point with certainty to the basis for the verdict, as in the case below. The Frints' final "conflicting" decision, *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) is even more distinguishable. *Kotteakos* was not a collateral source case. It addressed the federal harmless error statute in a criminal law context and is totally inapplicable to the case at bar.

The Frints' argument that the district court and the Eleventh Circuit misinterpreted Florida collateral estoppel law does not support the exercise of this Court's certiorari jurisdiction. This Court's reluctance to review diversity cases which set forth as the certiorari ground an alleged conflict with state law is reflected by the Supreme Court Rule 17.1 omission of the former Rule 19 item providing review of federal court of appeal

decisions that resolve "an important state or territorial question in a way in conflict with applicable state or territorial law."

In addition, the lower courts did not misinterpret Florida law.

First, as the evidence adduced below and the jury's answer to the jury verdict form demonstrate, the jury found no liability on Texaco's part. As the plaintiff testified, it had been raining all night. The jury properly could have determined that the plaintiff slipped on water from the rain. It insults the jury's intelligence to assert that it decided the case on damages where both counsel and the trial judge carefully explained to the jury that the special verdict form's first question involved liability only. Even if both lower federal courts mistrusted the jury and believed that the verdict was somehow based on the damages issues, the Florida collateral source cases are distinguishable and could not control the outcome of this case. Unlike the case at bar, the Frints' Florida cases involved general verdicts where the reviewing court could not determine whether liability or damages was the basis for the verdict.

Second, the Frints' counsel "opened the door" to evidence of social security benefits through direct examination of their own witness Schulenberger. One of the Eleventh Circuit panel judges observed that he saw no difference between social security retirement benefits and social security disability benefits. Also, as the Frints correctly state, at oral argument two of the Eleventh Circuit court judges seemed to accept Texaco's argument that the Frints opened the door to admissions of social security disability evidence. The panel directed

most of its questions to that issue. The court appeared to affirm on that basis, surely not a ground for conflict jurisdiction. Texaco certainly had a right to refute the testimony of plaintiffs' expert.

The Frints "immaterial" argument is also unavailing. (Petition, p.19). The Frints made the evidence of social security benefits material by introducing it not once, but twice through Schulenberger and June Burke. The Frints' contention that if the Eleventh Circuit affirmed on this basis, certiorari should be granted because the court thereby incorrectly applied the law on "curative admissibility", is unpersuasive. (Petition, p. 17-19). Curative admissibility is only one principle governing the admission of evidence. "Opening the door" to admissibility is another. The testimony of Mr. Schulenberger and Mrs. Burke left the door wide open.

Finally, the Frints' counsel failed to preserve the issue of social security benefits evidence by proper objection. It is axiomatic under either Florida or federal law that timely objection must be made to preserve evidentiary rulings for appeal. The Eleventh Circuit could have affirmed on that basis alone. Again, this is no ground for certiorari review.

Of equal significance, this case does not merit the highest review, because it is not sufficiently important to other litigants. The decision below is confined to its own peculiar facts and does not possess the requisite universality for certiorari review by the United States Supreme Court. This Court consistently has denied such Petitions arising out of diversity cases in negligence, property and contracts.

Nor would certiorari review establish important precedent or correct an erroneous decision. The unique facts (including the special verdict form and overwhelming factual testimony that Mr. Frint hurt himself slipping in rain water) guarantee no future precedential value.

The decisions below were not erroneous. The jury returned a correct and reasonable verdict on the facts. The judge interpreted Florida law and correctly instructed the jury. The district court correctly denied the new trial and the Eleventh Circuit properly affirmed. No error occurred. Simply stated, the Frints strain for a third "bite of the apple."

As highlighted by its speculative tone, the Petition establishes no direct conflict. The Frints allege: "Probably the appellate court did not decide that Petitioners opened the door." (Petition, p.13). "It is very possible that our jury was. . . ." (Petition, p.16). "If this was the basis for the decision, the writ of certiorari should be granted." (Petition, p.17). Finally: "If the Circuit Court decided Petitioners opened the door. . ." (Petition, p.20). Such speculation does not support certiorari review.

CONCLUSION

The Eleventh Circuit Court of Appeals reached a reasonable and permissible result. Based on the foregoing legal arguments and authorities, Respondent, Texaco, Inc. respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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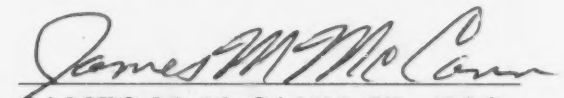
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of this Brief in Opposition to Petition for Certiorari were mailed to Paul Richard Bloomquist, Esq., 7601 North Federal Highway, Building A., Suite 265-A, Boca Raton, Florida 33431 this 10th day of October, 1986, by depositing the Briefs in a United States mailbox, with first-class postage prepaid pursuant to Supreme Court Rule 28(3).



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Appendix

INDEX TO APPENDIX

List of Texaco, Inc.'s
Affiliates and Subsidiaries A-1

LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO, INC.

Getty Oil Company
Getty Pipeline, Inc.
Riverway Gas Pipeline Company
Texaco Oils Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A. Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texaco Petroleum Company
Texaco Butadiene Company
Texaco Chemical Company

Canadian Reserve Oil and Gas Ltd.
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.